

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 249 of 1994

with

CIVIL REVISION APPLICATION No 896 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE D.G.KARIA Sd/-

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1. Whether Reporters of Local Papers may be allowed
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

1 Yes, 2 to 5 No.

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MAYURKUMAR INDUKUMAR SHAHERAWALA

Versus

AMRUTLAL POPATLAL PARMAR  
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Appearance:

1. Civil Revision Application No. 249 of 1994  
PARTY-IN-PERSON for Petitioner  
MR AJ SHASTRI for Respondent No. 1
2. Civil Revision ApplicationNo 896 of 1993  
PARTY-IN-PERSON for Petitioner  
MR AJ SHASTRI for Respondent No. 1

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CORAM : MR.JUSTICE D.G.KARIA

Date of decision: 30/09/96

ORAL JUDGEMENT

Both these Revision Applications arise from the proceedings in respect of the orders to pay Rs.88,000/- (rupees eightyeight thousand only) to the petitioner, who is the original plaintiff of Special Civil Suit No.203 of 1990 on the file of the learned Civil Judge (S.D.) at Rajkot. In Revision Application No.249/94, the petitioner-plaintiff has challenged the order dated 17.1.1994 passed by the learned 4th Civil Judge (S.D.), Rajkot, below application Exh.249. By that application, the petitioner prayed for payment of Rs.88,000/- as per the order passed below application Exh.14 and the request for such payment was turned down by dismissing the application Exh.249. In Civil Revision Application No.896/93, the petitioner-plaintiff has challenged the legality and validity of the order dated 6.7.1993 passed by the learned Civil Judge (S.D.), Rajkot below application Exh.155, whereby the said sum of Rs.88,000/- was ordered to be paid to the respondent-defendant.

Both these revision applications arise from chequered history as the parties have made several applications and challenged the orders passed below such applications by filing several Civil Revision Applications in the High Court. In order to appreciate the real controversy between the parties, few relevant facts need to be stated:-

The petitioner, who is the original plaintiff, has instituted the Special Civil Suit No.203/90 in the Court of the Civil Judge (S.D.) at Rajkot against the defendant-respondent for recovery of Rs.1,30,800/- and interest and costs. The defendant, who has been working as an Agent of Life Insurance Corporation, had taken loan of Rs.1,20,000/- from the plaintiff with a view to show that he has transacted business as an Insurance Agent on the condition that the defendant would pay the interest at the rate of one-and-a-half percent per month on the loan amount. The defendant also gave cheques to the plaintiff on 12.2.1990 drawn on Rajkot Nagarik Sahakari Bank, having passed writing in favour of the plaintiff about the loan transaction. It is not in dispute that the date on the cheque was changed from 12.2.1990 to 14.5.1990. The plaintiff also filed the application Exh.5 in the suit, purporting to be under Order 39, Rules 1 and 2 of the Code of Civil Procedure, praying to take

security on the amount that may be decreed in favour of the plaintiff and, alternatively, praying to restrain the defendant or his agent from withdrawing the amount that was lying to his credit in the Account No.5762 or anyother amount of the defendant with Bank of Baroda, and further restraining the defendant from withdrawing the sum that may be lying in credit or that may be credited subsequently. It was also prayed in the said application Exh.5 that the Manager of Bank of Baroda, Mandvi Chowk Branch, Rajkot, be also ordered and directed to deposit in the Court the amount that was lying at the credit of the defendant's account. A show cause notice was ordered to be issued on the application Exh.5 on August 20,1990.

The plaintiff also submitted the application Exh.6 in the suit seeking the injunction against the defendant restraining him to withdraw the amount from his Bank Account in Bank of Baroda, Mandvi Chowk Branch, Rajkot and further restraining the Bank Manager from paying such amount that may be credited in defendant's account from time to time,etc.The learned Civil Judge (S.D.), Rajkot, by his order dated August 20,1990 ordered to issue garnishee order under Order 21, R.46 of the Code of Civil Procedure and granted prayer made in para 4(1) of the application Exh.6.Accordingly, the Manager, Bank of Baroda, Rajkot, deposited Rs.88,000/- in the Court of Civil Judge (S.D.), Rajkot.

The plaintiff thereafter submitted an application, being application Exh.14, on 10.10.1990 contending, inter alia, that pursuant to the aforesaid order of the Court, the Bank Manager had deposited Rs.88,000/- in the Court and that the said sum be paid to plaintiff against the amount of the decree that is likely to be passed in his favour. The trial Court granted the said application on 4.12.1990 allowing the plaintiff-petitioner to withdraw the aforesaid sum of Rs.88,000/-, subject to the condition that: (i) plaintiff to give solvent security of Rs.1,00,000/- (rupees one lakh), (ii) plaintiff to declare that he shall not withdraw the suit after receiving the aforesaid amount from the Court, (iii) plaintiff to declare that the aforesaid amount is adjusted towards the suit claim.

As regards application Exh.5, the trial Court passed the order on the same day, i.e. on 4.12.1990, as follows:-

"Application for attachment before judgment is allowed. Defendant is directed to give security of Rs.62,000/- (rupees Sixty-Two Thousand only. If the defendant would not give security of Rs.62,000/-, then his moveable lying in his house at Prahlad Plot Street No.12 shall be attached during the pendency of the suit. If the defendant would give security of Rs.62,000/- then order for attachment before Judgment would not come in force.

No order as to costs.

Pronounced today in the open Court on this the 4th day of December,1990 at Rajkot.

Sd/-V.C.Shah,  
Civil Judge,S.D.,  
Rajkot."

The respondent-defendant, being aggrieved with the aforesaid order passed below application Exh.5, had preferred Civil Revision Application No.13/91 in the High Court. On January 8,1991, when the said Civil Revision Application came up for hearing, the defendant expressed his willingness and preparedness to furnish security as directed by the trial Court and eventually the Revision Application came to be disposed of

The respondent also preferred Civil Revision Application No.14/91 against the order dated December 4,1990 allowing the plaintiff to withdraw the deposited amount of Rs.88,000/- from the Court. The said Revision Application, being Civil Revision Application No.14/91 was admitted and ad interim relief was granted therein, allowing the parties to apply to the Court for getting the amount deposited in Nationalised Bank for suitable period. Accordingly, by application Exh.57, the plaintiff made an application on March 30,1991 requesting the Court to place the aforesaid amount of Rs.88,000/- in fixed deposit with any nationalised Bank. Accordingly, the Court ordered that the amount be so placed in the joint names of the plaintiff and the Nazir of the Court. The amount was thus deposited in the State Bank of Saurashtra, Rajkot, on 21.5.1991.

Earlier, the plaintiff had made the application Exh.51 seeking amendment in the above-referred to application Exh.5 seeking attachment before judgment of the amount as may be paid to the defendant by way of LIC commission by way of cheques and deposited in the Bank. The said application was allowed on 8.8.1991 by the trial Court and the LIC was ordered to be restrained from making payment of commission amoyunt to the tune of Rs.62,000/- to the defendant.

It appears that the defendant submitted a Civil Application No.2642/91 in the aforesaid Civil Revision Application No.14/91 in this High Court on 9.8.1991 expressing his readiness to furnish solvent security and seeking order for its acceptance. This Court (B.J.Shethna,J.)(as he was then) passed the following order on September 13,1991:-

"Heard the learned Advocates for the parties.

2. In the facts and circumstances of the case, the petitioner will make an application before the learned C.J.S.D., Rajkot in Special Civil Suit No.203/90 with regard to the furnishing of the security to the full amount and the learned Judge will decide the said application in accordance with law keeping in mind the provisions of Order-38,Rule9, C.P.C. Mr.Shah, L.A. for the respondent has no objection to the same.

3. In view of the above direction, learned Advocate for the petitioner seeks permission to withdraw this C.R.A. Permission granted. Dismissed as withdrawn."

By virtue of the aforesaid order, the defendant's C.R.A. No.14 of 1991 came to be dismissed as withdrawn against the order passed below application Exh.14 allowing the plaintiff to withdraw Rs.88,000/- that was then deposited in the trial Court.

Pursuant to the aforesaid order dated September 13,1991 of this Court, the defendant submitted application Exh.66 in the trial Court on September 30,1991 expressing readiness to furnish the security as ordered by the High Court. The defendant produced the security bond and village form No.7,12 and 8 of one Virji Khoda, who was prepared to be the surety of the defendant in respect of

attachment order of Rs.62,000/-. There appears to be some dispute raised by the plaintiff about the surety or security and the bond furnished for or in name of the abovenamed Virji Khodabhai. Therefore, by the order dated October 16,1991 passed below the said application Exh.66, the defendant was directed to give security of Rs.1,50,000/- by producing solvency certificate from Revenue Authority. As plaintiff had objected to same Virji Khodabhai to be the surety and as his surety certificate was to be obtained, the defendant offered another surety of Savji Nathabhai. The solvency certificate in favour of same Savji Nathabhai was also produced in the trial Court. The plaintiff appears to have raised some objection against solvency certificate alleging that the solvency certificate in name of Savji Nathabhai was incorrect. The plaintiff has submitted application Exh.83 in this connection. The trial Court, by the order dated 11.2.1992, disposed of the said application Exh.83 getting the property in question to be evaluated by Approved Government Valuer. The properties of the sureties of the defendant were assessed and necessary valuation certificate was issued and the defendant produced two sureties in respect of one which was agitated by the plaintiff. The defendant thereupon submitted applications Exhs.99 and 100 stating that the defendant was prepared to furnish sureties as ordered below Exh.66 for Rs.1,50,000/- and gave the names of two sureties--Janakbhai Naranbhai Rathod and Savji Nathabhai Parmar. The plaintiff filed his objection as per Exhs.105 and 106 against the application Exhs.99 and 100 of the defendant, contending, inter alia, that the defendant could not give such an application and Savji Nathabhai could not be accepted as surety. By the order dated June 24,1992, the trial Court rejected the applications of the defendant at Exhs.99,100,105,106,107,112,114 and 92 with regard to acceptance of the surety and solvency certificates holding, inter alia, that the order earlier passed was a singular order and two sureties cannot be accepted. The defendant, therefore, preferred Revision Application No.743/92 in the High Court against the aforesaid order rejecting the names of the sureties. This Court (Coram: S.D.Shah,J.) by the order dated 15.7.1992 allowed the said Civil Revision Application of the defendant directing the trial Court to consider two sureties furnished by the defendant in respect of the security of Rs.1,50,000/-.

It is pertinent to note at this stage that the defendant also gave application Exh.124 on 19.8.1992 in the trial Court claiming that he has furnished the

sureties and therefore he should be paid the amount of Rs.88,000/- that was lying in the fixed deposit as noticed hereinabove.

The plaintiff objected to this application contending, inter alia, that the correct value of the properties and the sureties was required to be ascertained and that the solvency certificate of the defendant's surety, Janakbhai Naranbhai Rathod was for only Rs.22,497.84 ps. The learned trial Judge by his order dated September 25,1992, passed the following order below application Exh.124:-

"1. Surety Shri Savji Nathabhai's property would of the value of about Rs.85,000/- and the second surety Shri Janakbhai Naranbhai Rathod is worth of more than Rs.3,00,000/- is ascertained on the strength of the evidence on record.

2. Therefore, the aforesaid both the sureties are sufficient to secure the amount of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand) which is required to be secured as per order Exh.66 dt.16-10-91 of this Court. Therefore, surety Shri Janakbhai Naranbhai Rathod and Shri Savjibhai Nathabhai both are accepted as sureties for the tune of Rs.1,50,000/- jointly and severally and the surety as per bond mark 103/4 produced in this case. On the condition precedent that both the above sureties are declared on oath before the Court that they have not made any encumbrances over their respective property shown in the solvency certificate i.e. by sale, transfer, mortgage, hypothecation or by any means till today. Further, both the sureties are also file an undertaking on Non-judicial Stamp of Rs. 15(fifteen) that they will not make any encumbrances over their respective property shown in the solvency certificate i.e. by sale, transfer, mortgage, hypothecation or by any means till today. Further both the sureties are also filed an undertaking on Non-judicial stamp of Rs.15/- that they will not make any encumbrances over the said property till the final decision of the present suit.

3. It is further ordered that both the sureties to fulfil the above requirements on or before 8-10-92 and on fulfilment of the above condition, order of the attachment of the moveable property of the defendant is released and as well as the defendant is at liberty to

withdraw the amount of Rs.88,000/- (Rupees Eighty-eight Thousand) deposited in the State Bank of Saurashtra, Rajkot as per order passed below Exh.14 on 4-5-1991. Accordingly, I allow the present application Exh.124 and also allow the application of the defendant Exh.100 accordingly and disposed off the same."

The trial Court appears to have committed an error and reading the order passed below application Exh.14, inasmuch as by the order below Exh.14, the amount of Rs.88,000/- was ordered to be paid to the plaintiff and not to the defendant. Therefore, there was no question of allowing the defendant to withdraw the amount as per the order passed below Exh.14 on 4.5.1991. There is, therefore, clear misreading of the order below Exh.14. The learned trial Judge appears to have stated wrong date of 4.5.1991 instead of 4.12.1991. Mr.A.J.Shastry, learned Advocate appearing for the respondent, submitted that there should be some another order dated 4.5.1991 allowing the defendant to withdraw Rs.88,000/-. However, he has not been able to show any such order dated 4.5.1991 or any such order whereby the defendant was allowed to withdraw Rs.88,000/-, except one below Exh.124.

The defendant gave the application Exh.155 on November 18, 1992 in the trial Court claiming the payment of Rs.88,000/- to him. By the order dated July 6, 1993, the amount of Rs.88,000/- is ordered to be paid to the defendant-respondent. The plaintiff-petitioner, therefore, challenged the said order in Civil Revision Application No.896/93. The learned trial Judge while passing the impugned order below application Exh.155, has clearly ignored the earlier order passed below application Exh.14, whereby the trial Court itself ordered to pay the amount of Rs.88,000/- to the plaintiff-petitioner. It may be mentioned at this stage that earlier two Civil Applications bearing Civil Applications No.244/93 and 636/93 were filed before this Court which came to be disposed of by this Court (Coram: S.D.Shah,J.) on 19.4.1993. It was directed in that order that the amount of Rs.88,000/- shall not be disbursed till the Civil Revision Application No.14/91 was finally disposed of. It is, therefore, difficult to appreciate as to how the trial Court could pass the order on 6.7.1993 with regard to payment of Rs.88,000/- to the defendant, when this High Court had directed it not to disburse the amount to anyone till disposal of the pending Civil Revision Application. By ad interim relief granted in the present Civil Revision Applications, the



said sum of Rs.88,000/- was stayed to be paid to either party. Thus, in view of the aforesaid order passed by this Court (Coram: S.D.Shah,J.) on 19.4.1993, copy of which is page 22 of the compilation, it was not open or justified to the trial Court to pass any order with regard to payment of Rs.88,000/- to the defendant. The said order was even otherwise contrary to the earlier order passed below application Exh.14 whereby the plaintiff was ordered to be paid the said sum of Rs.88,000/-. Civil Revision Application No.14/91 challenging the order below application Exh.14 came to be dismissed as withdrawn and no specific order as regards payment of Rs.88,000/- to the plaintiff-petitioner was quashed, altered or modified in any manner by the High Court while disposing of the said Civil Revision Application No.14/91.

I have heard Mr.Mayur Indubhai Sherawala, who appeared as party-in-person. I have also heard Mr.A.J.Shastry, the learned Advocate appearing for the respondent, at length.

In submission of Mr.Shastry, the order passed below application Exh.14 in respect of payment of Rs.88,000/- to the plaintiff was modified by the High Court while disposing of the Civil Revision Application No.14/91 by furnishing necessary securities by the defendant-respondent. I see no substance in this submission, for the sureties were to be submitted for the amount of Rs.1,50,000/- in respect of Rs.62,000/- that was sought to be attached, pursuant to the order dated 4.12.1990 passed below application Exh.5. It appears that both these orders with regard to the attachment of Rs.62,000/- and furnishing of security, surety in this behalf and the order about payment of Rs.88,000/- to the plaintiff appear to have been confused. It is crystal clear on the record that the order as regards payment of Rs.88,000/- to the plaintiff as per the order passed below application Exh.14 has not been modified or amended in any way, at the time of disposal of the Civil Revision Application No.14/91 by the High Court. The only order that came to be passed at the time of disposal of the Civil Revision Application was that it was open for the respondent to make necessary application for furnishing security in the trial Court. No order was sought about payment of Rs.88,000/- to the defendant and the order of payment of Rs.88,000/- to the plaintiff came to be affirmed on dismissal of the Civil Revision Application No.14/91.

The learned trial Judge has passed the order below application Exh.124 without perusing the record properly. The learned trial Judge while disposing of the application Exh.124 ordered to pay the amount in question to the defendant as per the order passed below Exh.14. In fact, there is no order of payment of the amount to the defendant as per the order below application Exh.14. The order below Exh.14 clearly recites that the said sum is to be paid to the plaintiff subject to the conditions set out therein. There is, therefore, clear misreading by the trial Court in passing of order below application Exh.124. The impugned order in Civil Revision Application No.249/94 is on the basis of the order below Exh.124. While passing the impugned order, the trial Court continued to commit the same mistake again by not examining the earlier order below Exh.14 in its proper perspective. Records reveal that the court below appears to have confused both the proceedings, (i) with regard to attachment of Rs.62,000/- and taking security and sureties of the defendant in this behalf, and (ii) the order with regard to payment of Rs.88,000/- to the plaintiff. This appears to have taken place on account of the bulky record and the chequered history as noticed hereinabove. However, the trial Court, while passing the impugned order and ordering to pay the amount in question to the defendant, has clearly omitted to consider the earlier order below application Exh.14 with regard to payment of Rs.88,000/- to the plaintiff. Thus, the orders of the trial Court passed below Exhs.66 and 124 are inconsistent with the earlier order and both these orders are passed without referring to the order passed below Exh.14 in proper way and confusing the matter of obtaining surety/security of the attached amount of Rs.62,000/- with that of the order of payment of Rs.88,000/- to the plaintiff-petitioner.

In the above view of the matter, the trial Court, while passing the impugned orders, acted in exercise of its jurisdiction illegally and with material irregularity by not perusing the record properly, causing failure of justice. Therefore, both these Revision Applications deserve to be allowed.

In the result, both these Civil Revision Applications are allowed. The impugned orders are quashed and set aside. The trial Court is directed to

pay the sum of Rs.88,000/- (rupees eightyeight thousand only) to the plaintiff-petitioner with interest accrued thereon, subject to the conditions of the order on application Exh.14. Rule is made absolute accordingly, in each of the Civil Revision Applications, with no order as to costs. Application Exh.155 shall stand rejected. Application Exh.249 stands granted.

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October 4,1996.

After delivering and signing the judgment, Mr.A.J.Shastry, learned Advocate for the respondent, has requested to stay the operation of the judgment and order for four weeks in order to enable him to approach the Supreme Court. Mr.Mayurbhai Indukumar Shaherawala, appellant-party-in-person, is personally present and vehemently objects to grant of any stay order, contending, inter alia, that the respondent has deliberately confused the matter and since 1990 the proceedings are pending and he is kept without payment of his due amount by the order of the trial Court. In the facts and circumstances of the case, request for grant of stay cannot be accepted. Hence the request is rejected.

(D.G.Karia,J.)